HIGH COURT OF UTTARANCHAL, AT NAINITAL

Criminal Jail Appeal No. 225 of 2002

Hayat Singh S/o Sri Balo Singh
R/o village Kapkote
P.O. Kapkote
Tehsil & District Bageshwar ...Appellant

Versus

State .....Respondent

Mr. J.S. Virk learned Amicus Curiae for the appellant.
Mr. Lalit Verma learned A.G.A.

Hon'ble J.C.S. Rawat, J.

This is a criminal jail appeal against the judgment and order dated 23.7.2002 passed by Sri Ram Dass, the then Special Judge, Bageshwar in Special S.T. No.4/2002, whereby the Special Judge has convicted the appellant and sentenced him to undergo RI for ten years & fine of Rs. 5,000/- under section 376 IPC; to undergo RI for 3 years & fine of Rs.2,000/- under section 452 IPC and to undergo RI for 10 years & fine of Rs.5000/- under section 3(2)(5) of S.C./S.T. Act. In default, the appellant to undergo simple imprisonment for 3 months, 2 months and 3 months respectively. However, it was directed that all the sentences would run concurrently.

2. I do not propose to mention the name of the victim. Section 228-A IPC makes disclosure of the identity of victims of certain offences punishable. Printing or publishing the name or any matter which may make known the identity of any person against whom an offence under section 376 is alleged or found to have been committed can be punished. True it is, the restriction does not relate to printing or publication or judgment by the High Court or the Supreme Court. But keeping in view the social object of preventing social

victimization or ostracism of the victim of a sexual offence for which section 228-A IPC has been enacted, it would be appropriate that in the judgments the name of the victim should not be indicated. I have chosen to describe her as “victim” in the judgment.

3. The case of the prosecution, in brief, is that on 26.11.2001 at about 9PM when the complainant Lacchi Ram (PW-1) alongwith his wife Smt. Motima Devi (PW-2) had gone for participating in ‘Ghanyali’ in Toke Sultui, Kapkote village the appellant-Hayat Singh reached the house of the complainant and entered into the house where the daughter of the complainant (victim-PW3) was in the room. Thereafter, the appellant committed the rape on the victim-PW3. On hearing the cry, the neighbours i.e. Sundar Lal, Ram Prasad and Harish Ram reached there and saw the appellant in the alleged house alongwith the victim-PW3. These people got the victim out and the appellant was locked in the same room and went to call the complainant- Lachhi Ram (PW-1) from the village Sultui. After reaching the place of incident, the complainant-Lachhi Ram (PW-1) filed a written complaint (Ex.ka.1) before the Circle Patwari, Kapkote. On the basis of it, the check FIR (Ex.ka.6) was prepared and the case was registered against the appellant. The I.O. reached on the spot and prepared the site plan (Ex.ka7). The ‘payjama’ and ‘chaddi’ of victim-PW3 were taken into possession and recovery memo was prepared thereof (Ex.ka.10). The appellant was arrested from the house of the complainant on the same day i.e. 27.11.2001. His ‘chaddi’ and blade was taken into possession by the police and the recovery memo was prepared thereof (Ex.ka.9). The prosecutrix-victim was examined by the doctor and the medical report was prepared which is

Ka.ka.4. The clothes of the victim-PW3 & the appellant and the swab were sent to the chemical examination. When the I.O. came to know that the victim was related to the schedule caste community and the appellant was not related to the schedule caste community, the investigation was handed over the Niab Tehsildar for remaining investigation. The investigation was taken up as usual which culminated into the submission of the chargesheet.

4. Charges under section 376, 354, 452, IPC and under section 3(2)(5) S.C./S.T. Act were framed against the appellant. The appellant denied the charges and claimed the trial.

5. In order to prove its case, the prosecution examined nine witnesses. Lachi Ram (PW-1) was the complainant and the father of the victim. He proved the written FIR (Ex.ka1). Smt. Motima Devi (PW-2) was the mother of the victim. The prosecution has produced victim-girl as PW-3. Harish Ram (PW-4) was the neighbor of the victim. Smt. Usha Jangpangi (PW-5) conducted the medical examination of the victim. In the opinion of medical officer, there was not any abrasion on the body of the victim and hymen was old torn and healed up blood or other discharge was not found. Then, the “victim” was referred to the radiologist for X-ray. The victim was found habitual to sexual intercourse. The medical officer has adduced in the cross examination that no symptoms were present of any attempt for rape. There were also no symptoms of commission of rape against the victim before 12 to 20 hours of the medical examination. The medical officer proved the medical report Ex.ka.4. Kushal Ram (PW-6) was the Patti Patwari

and he proved the FIR Ex.ka.1. Pramod Gururam (PW-7) proved the X-ray plate report Ex.1 and X-ray report Ex.ka.5. He opined that the age of the victim was between 17 to 18 years at the time of the incident. Mohan Ram (PW-8)-Patwari is the first Investigation Officer who proved the check FIR (Ex.ka.6). He also prepared the site plan. He also proved the factum of arrest of the appellant from the house of the complainant. Kailash Chandra Toliya (PW-9) is the second Investigating Officer who completed the remaining investigation and submitted the chargesheet.

6. The appellant-Hayat Singh has stated under section 311 Cr.P.C. that he has been falsely implicated. However, no defence evidence was adduced by the appellant.

7. The learned trial court on appreciation of the evidence on record held that the prosecution has proved its case beyond reasonable doubt against the appellant and sentenced the appellant as mentioned above.

8. I have heard Mr. J. S. Virk learned Amicus Curiae for the appellant and Sri Lalit Verma learned A.G.A. and gone through the record.

9. At the outset, I have to consider as to whether the appellant committed the offence of rape by entering into the house of the victim on the date of occurrence. The prosecution adduced the evidence of victim-PW1. She was the student of Class-9th at the time of the incident and rape was committed on her on 26.11.2001 at about 8PM in the night when her father and mother Lachhi Ram (PW-1) and Smt. Motima Devi (PW-2) respectively had

gone in the evening of 26.11.2001 for participating in ‘Ghanyali’ in Toke Sultui, village Kapkote being at a distance of one furlong from the house. The victim-PW3 had stated in her evidence that her parents locked the house from outside and she closed the window from inside. She further stated that she was in the room in the light of the lamp. The appellant entered forcibly into her room through the window and extinguished the lamp. He torn her clothes and committed rape on her. Thereupon, she cried and her dog started barking. On hearing the cry her neighbour came there and saw the appellant inside the room. Then, the neighbour got the victim out through window and the appellant remained inside the house. Harish Ram (PW-4) who is the nephew of Lachhi Ram (PW1) stated that he was also going to hear the ‘Jagar’ at 8PM in the night of 26.11.2001 alongwith Ram Prasad and Shanti Lal. On hearing the cry of victim and barking of dog near the house of the Lachhi Ram (PW1), he saw that the victim-PW1 jumped out from the room through the window. The victim-PW1 then narrated the whole story to him. Harish Ram (PW-4) had further stated in his evidence that he saw inside the house through the window in the light of the torch and found that the appellant was there. Both the witnesses i.e. victim-PW3 and Harish Ram (PW-4) further stated that Harish Ram and Ram Prasad went to call Lachhi Ram (PW3) from ‘Ghanyali’. After reaching there they narrated the whole story to Lachhi Ram PW-1 and Smt. Motima Devi PW-2 (father and mother of the victim). Lachhi Ram (PW-1) also took Balo Singh – the father of the appellant and reached at the place of incident. Then, the victim-PW3 narrated the whole story to her mother Smt. Motima Devi (PW-2) and the appellant remained inside the house till the next morning i.e. 27.11.2001.

They further stated that the appellant belongs to the ‘Thakur Caste’ and their caste is ‘Shilpkar’. Then, Lachhi Ram (PW-1) lodged the report on 27.11.2001 at about 9AM with the Patti Patwari.

16-A It is well settled that the prosecutrix in a sexual offence is not an accomplice and there is no rule of law that her testimony cannot be acted upon and made the basis of conviction unless corroborated in material particulars. However, the rule about the admissibility of corroboration should be present to the mind of the Judge **{See Dilip Vs. State of M.P. SCC 2001(9) p/452}**

10. In **State of H.P. Gian Chand {2001 (6) SCC p/71, 2001 SCC (Cri) p/980}** on a review of decisions of this Court, it was held that conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by the medical evidence and other circumstances such as the report of chemical examination etc., if the same is found to be natural, trustworthy and worth being relied on.

11. In **Madan Gopal Kakkad Vs. Naval Dubey {1996 (2) SCC p/384, 1996 SCC (Cri) p/316}** Apex Court held that lack of oral corroboration to that a prosecutrix does not come in the way of a safe conviction being recorded provided the evidence of the victim does not render it unworthy of credence, and that the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming.

12. All the witnesses have stated in their evidence that the appellant entered into the house through the window and committed the rape on the victim. It is also in the

evidence of the prosecution that the victim sustained one injury on her cheek and one injury on her chest. It is also in the evidence that the victim jumped out through the window and she sustained injury on her leg. However, in the medical report no such injuries were found on the person of the victim. As such, there is a contradiction between the medical evidence and the ocular testimony of the witnesses. Apart from this, the prosecution has produced the evidence of Dr. Usha Janpangi (PW-5) who conducted the medical examination of the victim and found that there was not any abrasion on the body of the victim. She further opined that hymen was old torn and healed up blood or other discharge was not found. There were no injuries or tenderness on genital area and two fingers easily entered into the vagina of the victim. the victim-PW3 was referred to the radiologist for X-ray. Victim-PW3 was found habitual to sexual intercourse. During the cross examination, Dr. Usha Janpangi (PW-5)
has stated as follows:-

> *'' कु पारो पर किसी ने अलात प्रयास किया हो ऐसा प्रतीत नही हो रहा था पारो के ब्रस्ट, गाल पर, हाथ पर पेट या पीठ मे कही कोई खरोच नहीं थी, प्यूविक हेयर मे भी को* discharge *नही था, ऐसा प्रतीत नही होता था कि पारो के साथ परीक्षण के समय से 12 या 20 घन्टे पूर्व कोई बलात्कार किया गया हो परीक्षण से यह प्रतीत होता था कि कु पारो सम्भोग करने की आदी थी। ''*

The medical officer has deposed during the cross examination that no symptoms of rape of attempt were present. There were also no symptoms of commission of rape against the victim-PW3 before 12 to 20 hours of the medical examination. During the medical examination, it was found that the victim was 17 to 18 years old at the time of the incident. The medical report and the evidence of Dr. Usha Jangpangi (PW-5) clearly belies the prosecution evidence that the rape was committed on the

victim. Thus, the medical report (Ex.ka.4) and statement of the doctor does not corroborate the factum of rape, as such it creates a doubt about the commission of rape on the victim.

13. The Hon'ble Apex Court while appreciating the evidence in similar circumstances acquitted the appellant-accused observed in **Devinder Singh and other Vs. State of Himanchal Pradesh 2003 (11) SCC p/488:-**

> *"5. The case of the prosecution rests mainly on the testimony of the prosecutrix, PW1, though some other witnesses had also been examined. The prosecutrix was got medically examined at Moorang Hospital by Dr. Lalita Negi, PW2. Before adverting to the deposition of PW1, we may notice the evidence of Dr. Lalita Negi, who had examined the prosecutrix on 26.2.1994. A perusal of her report shows that there was no injury on any part of the body. There was no matting of public hair with discharge. There were no injuries, or tenderness on genital areas. Hymen was reptured and the old scars were present. No fresh scars or tenderness were found. There was no tenderness in the vaginal organ or the cervical area. In her opinion there was no evidence of recent sexual intercourse and there was no sign of struggle. The prosecutrix was used to sexual intercourse. There was no evidence of sexual assault of the prosecutrix within a week of her examination. ……*
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> *In her cross-examination, she stated that she did not mention about the struggle in her certificate but she had mentioned that there was no injury on the person of the prosecutrix. She, however, explained that in the case of sexual assault on a lady, if she is*

put under fear, there may or may not be injuries and if the lady concerned is habituated to sexual intercourse there may not be any injury. She, however, asserted that there was no evidence of recent sexual intercourse with the prosecutrix.

6. It would thus appear from the medical evidence on record that no evidence could be found by the medical officer to prove that she had been subjected to sexual assault by five persons. Having regard to the facts and circumstances of the case, particularly in view of the fact that the prosecutrix was habituated to sexual intercourse and was examined six days after the occurrence, the fact that no injury was found on her body only goes to show that she did not put up any resistance. That may be on account of the fact that she was overpowered by five persons and as described by her, they kept he legs and hands pressed. The medical evidence on record, however, does not affirmatively support the case of the prosecution and the prosecution can, therefore, derive no support from the medical evidence on record.

17. The medical evidence on record, as we have noticed earlier, does not support the case of the prosecution since on the basis of medical evidence, it cannot be held affirmatively that the prosecutrix was subjected to sexual assault as alleged."

14. The prosecution also produced the report of the chemical examination. Payjama, swab and Chaddi relating to the victim-PW3 were sent for chemical examination and after examination of the same it was found that there were blood stains on the Pajama and

Chaddi. No blood was found on the swab. The victim-PW3 had stated that her clothes had semens strain which were taken into possession by the Patwari. The report further reveals that there were no sperm on the salwar, swab and Chaddi of the victim. the semen spot and sperm were found on the Chaddi of the appellant. However, the stains so available were not found enough to get any positive result. The absence of semen on the salwar, swab and Chaddi further belied the evidence of the rape on the victim.

15. It has been held by the Apex Court in **Sudhansu Sekhar Sahoo V. State of Orissa; 2003 SCC (Cri) p/1484** that she produced these clothes before the police, but these clothes did not contain any stain either of blood or semen. Had there been any stains of semen or blood on the clothes allegedly worn by her at the time of commission of offence, it would have gone a long way to prove the case of the prosecution, especially the victim being an unmarried woman. It has been further held that;-

> *"Unfortunately, the broad probabilities of the case were not considered by the Sessions Court or the High Court in the instant case. Ms. X, though asserted that she had sustained scratch injuries by nails and biting, her medical examination did not reveal any such injuries. It is true that in view of the social conditions prevalent in India, there may be delay in giving the first information of such an offence to the police. A rape victim may think seriously before giving the information to the police about rape as the onslaught of a social stigma may haunt her for life. Though the delay as such is not serious, but while considering the broad probabilities*

of the case, the delay in giving the information to the police, the instant case, also assumes some importance. Though the past conduct of the prosecutrix is an irrelevant matter, in the instant case, Ms X asserted that she was a virgin till the date the alleged incident, but the medical evidence supported by her physical features revealed that she was habituated to sex. All these factors cast a serious doubt on the prosecution case. Though there is no apparent motive for Ms X to falsely implicate the appellant it may be that Ms X must have changed her mind when she came to know that others must have come to know of her conduct. So there are so many loose ends in the prosecution case. On a consideration of the broad probabilities of the case, we feel that various factors cast a serious doubt about the genuineness of the case of Ms X that she had been forcibly ravished by the appellant. The appellant is certainly entitled to the benefit of doubt. Therefore, we set aside the conviction of the appellant under section 376 and 342 I.P.C. and allow his appeal. The appellant was granted bail by this Court. The bail bonds furnished by the appellant are cancelled."

16. In the prosecution evidence, it has been stated that the parents of the victim went for participating in 'Ghanyali' and locked the door from outside. It has further come in the evidence that the window was locked from inside and there were no iron bars on the window. The prosecution has also adduced the evidence that the appellant entered into the house by breaking the window. Harish Ram (PW-4) has stated in his evidence that the window was at the height of about 7 or 8 ft. from the

ground. The victim-PW3 has also stated during the cross examination that her house where the incident took place is a double story house and she was in the first floor at the time of the incident and the height between the ground and the window is about 7 ft. The victim has further stated that the appellant did not take the help of any stair and it was also stated that the window was closed from inside and the size of the window is said to have been 2ft. to 3ft. Lachhi Ram (PW-1) and victim-PW3 have stated in their evidence that they had a dog inside the room which was tied with the chain at the time of the incident. The victim has stated that it did not bite the appellant as it was tied with chain. It would have been the natural conduct of the victim to unchain the dog when a stranger was breaking the window while she was alone. In case, she would have unchained the dog the appellant would not have caught hold of her. Thus, the conduct of the victim is unnatural and improbable. Thus, the theory of the prosecution that the appellant entered into the room without any assistance through the window, which is more than 7ft. in height from the ground, is totally improbable and unbelievable. It is not possible to climb on a wall of more than 7ft height and thereupon to break the window having no iron bars without any assistance. The prosecution evidence had also some inconsistencies with regard to the accommodation available in the house in which the offence was committed. Lachhi Ram (PW-1) has stated that there are two rooms in the house. One room is situated in the first floor and one room is situated in the ground floor. The victim-PW3 stated in her evidence that it is a double storeyed house and it has two rooms one is at the ground floor and one room is at the first floor. The room situated on the upper storey had had four doors and

two windows. Whereas Smt. Motima Devi (PW-2) has stated in her evidence that one room is situated on the ground floor which is used for keeping the animals and there are two rooms in the upper storey having one door and one big & two small windows. Perusal of the site plan Ex.ka.7 reveals that it was a single storeyed house having three rooms. Mohan Ram (PW-8) has stated in his cross examination that he has not shown the house (where the incident took place) as double storeyed house in the site plan Ex.ka.7. In case the house was single storeyed then the whole story of the prosecution with regard to climb on the wall and thereafter to break the window is belied. The victim-PW3 had stated in her evidence that the room in which the incident took place had one door and one big & two small windows. The victim-PW3 has stated that the room situated at the first floor where the incident took place had four doors and two windows. Thus, the victim had sufficient opportunity while the appellant was breaking the window to cry or to escape from these windows. If it was single storeyed house as stated by Smt. Motima Devi (PW-2) and I.O. thus this would have been more easily. It is also in the evidence of Smt. Motima Devi (PW-2) and Mohan Ram (PW-8) that it had more than one room in the first floor. If it was so, the natural conduct of the victim-PW3 would have been to go in the other room and make a cry therefrom that someone had entered into her room forcibly. Thus, the conduct of the girl was unnatural and improbable. Harish Ram (PW-4) has stated during cross examination that he did not see the act of teasing as the room was dark. He further stated that he saw the appellant with the help of the torch. However, the room was situated at 7ft. or 8ft. above from the ground. Thus,

the evidence of Harish Ram (PW-4) is improbable as to how he saw the appellant from a considerable height.

17. The learned Amicus Curiae has contended that the prosecution has claimed that the appellant was arrested from the place of occurrence and it is also pertinent to mention there that the appellant committed the rape on the victim and he did not escape from the room. There was sufficient occasion for the appellant to run from the place of incident. The learned Amicus Curiae has further contended that the appellant was arrested from his residence and the theory or arrest is not believable. Perusal of the evidence clearly reveals that the prosecution witnesses have stated that the appellant had opportunity to escape from the place of occurrence and he did not do so. It is very improbable that if an offence is committed by a person and he remains inside the house for the whole night. Though, there was occasion to run away from the place of occurrence. Thus, the factum of arrest from the house of the victim seems to be improbable.

18. The learned Amicus Curiae has contended that the FIR was not lodged in the same day i.e. 26.11.2001 and it was lodged on the next day of the occurrence at about 9AM. The learned Amicus Curiae has further submitted that if such incident would have happened then Lachhi Ram (PW1) would have immediately lodged the report on the same day. The prosecution adduced the evidence of Khushal Ram (PW-6) who stated in his evidence that he scribed the written report on the dictation of Lachhi Ram (PW-1) at about 7:30 PM on the next date of occurrence. It is claimed that appellant was inside the room and Lachhi Ram (PW-1) did not lodge the report in the night

itself. The headquarter of the Patti Patwari is only 5KM. It is also improbable that the appellant was inside the house and nobody entered into the house. The incident was reported on the next day. In the peculiar circumstances of the case, it would have been reported on the same day. Whereas Lachhi Ram (PW-1) had stated during cross examination that he is an illiterate person and he can make the signatures only. He further stated during cross examination that the written report was scribed by Prem Ram on his dictation. Thus, there are two different versions with regard to the scriber of the report. The report scribed by Khushal Ram (PW-6) was produced before the court and the FIR was lodged on the basis of the said report by Pramod Gururam (PW-7) and the report which was scribed by Prem Ram was not produced before the court. Thus, the evidence of Lachhi Ram does not inspire confidence and his evidence is not trustworthy. While acquitting the accused in the similar circumstances the Hon'ble Supreme Court has observed in **Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P. and another 2003 (3) SCC p/175:-**

> *"10. So far as the first information report is concerned, she stated that she and her brothers Baban and Subhash thought over the incident and thereafter went lodge the complaint. She first stated that Subhash had written down the report, then the changed her version stating that Subhash had not written but had signed on the complaint. Again she said that while in the house nothing was written, and Subhash had signed in the police chowki. Then again she corrected herself by saying, in the police chowki no one signed but he had signed on the FIR at Vartakanagar Police Station. She was examined by the doctor at about 9:00PM."*

19. The learned Amicus Curiae has contended that the appellant was aged about 18 years as stated by him in his statement under section 313 Cr.P.C. recorded on 29.06.2002. It has been argued that the appellant was about 16 years of age at that time of the incident i.e. 26.11.2001 and was covered under the definition of Juvenile Justice Act, 1986 or under the Juvenile Justice (Care and Protection of Children) Act, 2000 and the appellant should have been set at liberty even if he was found guilty. It was further contended that the learned Session Judge should have directed the appellant according to the provision of the Juvenile Justice (Case and Protection of Children) Act, 2000 but in view of the fact that he is now about 19 years of age, he should be set at liberty. I need not to say anything further in view of my verdict of acquittal on account of inabilities of the prosecution to prove the case beyond reasonable doubt.

20. On an overall appreciation of the oral evidence of the prosecution and medical evidence, I have come to the conclusion that the evidence of the victim is not cogent and credible. The learned session Judge erred in holding the appellant guilty on improbable and infirmity testimony of the victim. The testimony of the victim and the prosecution witnesses suffers from infirmities. It is no doubt true that in law the conviction of an accused on the basis of the testimony of the prosecutrix alone is permissible, but that is in a case where the evidence of the prosecutrix inspires confidence and appears to be natural and truthful. The evidence of the prosecutrix in this case is not of such quality, and there is no other reliable and cogent evidence on record, which may even

lend some assurance, short of corroboration that she is making a truthful statement.

21. In view of the foregoing discussion, I am of the view that the prosecution evidence is not cogent, credible and trustworthy and the appellant could not be saddled with the liability of committing the crime. Therefore, the appellant deserves to be acquitted of the charges levelled against him.

22. For the reasons aforesaid, the appeal succeeds and is hereby allowed. The judgment and order dated 23.7.2002 passed by the Special Judge, Bageshwar are set aside. The appellant is acquitted of the charges U/s 376, 452, 354 and Section 3(2)(5) S.C./S.T. Act levelled against him. He shall be released forthwith, if not wanted, in any other case.

23. Let the record be sent back to the court concerned for necessary action and the compliance report to be submitted within two months.

(J.C.S. Rawat, J.)

Dated 01.10.2004

Rawat